Nos. 91-6658 and 91-6659

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LARRY KINDER, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID KINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly calculated the amount of drugs used to determine petitioners' base offense level.

2. Whether the district court correctly adjusted petitioner Larry Kinder's sentence upward under Sentencing Guidelines § 3B1.1(c) based on his management or supervision of criminal activity.

3. Whether the government violated its plea agreements with petitioners.

4. Whether petitioners were entitled to a reduction in the base offense level under Sentencing Guidelines § 3E1.1 for acceptance of responsibility.

5. Whether methamphetamine has been properly classified as a Schedule II controlled substance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 549-557)[1/] is reported at 946 F.2d 362.

[1/] The pagination of the court of appeals opinion is the same in the appendix to each petition.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1991. The petitions for a writ of certiorari were filed on December 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who are brothers, entered guilty pleas in the United States District Court for the Western District of Texas to the charge of conspiring to possess methamphetamine with intent to distribute it. Petitioner Larry Kinder was sentenced to 210 months' imprisonment, to be followed by a five-year term of supervised release, and he was fined $5,000. Petitioner David Kinder was sentenced to 400 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 549-557.

1. In February 1990, an informant advised Officer Floyd Goodwin of the Texas Department of Public Safety that petitioner Larry Kinder (Larry) was looking for a new source of supply for his methamphetamine distribution operation. The informant told Officer Goodwin that Sandra Kay Shook sold methamphetamine and collected the proceeds of the sale for Larry, but that Larry controlled the operation. According to the informant, Larry sold between one-half and one pound of methamphetamine per week in the Waco area. Pet. App. 552.

On February 8, 1990, Officer Goodwin negotiated by telephone with Larry and Shook to sell some methamphetamine. Shook subse-

quently went to Goodwin's hotel room. After advising Goodwin that she took care of most of Larry's "dope business" for him, Shook discussed a possible purchase from Goodwin of a quarter-pound of methamphetamine. Goodwin told Shook that the $2,600 offered was not worth his time, and he declined to sell. Shook then stated that she and Larry were not interested in purchasing a larger amount because they still had eight ounces of unsold methamphetamine, but that they would return later in the evening with more money. Pet. App. 552.

Shortly thereafter, Larry advised Goodwin by telephone that he was trying to raise the money to buy a half-pound of methamphetamine. Shook later telephoned Goodwin and told him that they had only $3,400. Goodwin refused to sell the quarter pound at that price. Shook told Goodwin that Larry would want to buy at least a half-pound of methamphetamine the following week. Pet. App. 552.

On February 14, Officer Goodwin was informed that Larry was ready to buy a half-pound of methamphetamine. That evening, Larry and his brother, petitioner David Kinder (David), met Goodwin and the informant in Goodwin's hotel room. Larry explained to Goodwin that he had not wanted to buy a large amount of methamphetamine the preceding week "because he had 17 ounces of methamphetamine on the street and had not collected all of the money from the sale of [it]." Larry told Goodwin that he wanted to buy a half-pound now, and that he might want more later. On Larry's instructions, David gave Goodwin some bundles of money,

telling Goodwin that there was $5,800 in the bundles. Pet. App. 552.

The informant retrieved the half-pound of methamphetamine from a dresser drawer. Larry instructed David to test the substance; David did so by snorting some and by injecting some into his arm with a syringe. David agreed that the methamphetamine was "good enough." At Larry's direction, David took the methamphetamine outside. The two brothers were then arrested. Pet. App. 552.

Petitioners pleaded guilty to one count of conspiring to possess more than 100 grams of methamphetamine with intent to distribute it. In exchange for the plea, the government promised not to prosecute petitioners for any additional offenses based on the facts then known to the government. Gov't C.A. Br. 13.

2. Larry's presentence report calculated that his Sentencing Guidelines range was 168-210 months' imprisonment, based on an adjusted offense level of 32 and a criminal history category of IV. Larry Kinder Presentence Report (LK Report) 8-11, 14. David's presentence report calculated that his Sentencing Guidelines range was 360 months to life imprisonment, based on an adjusted offense level of 37 and a criminal history category of VI. David Kinder Presentence Report (DK Report) 8-14, 22. The offense level for both petitioners was based on 750.95 grams of metamphetamine representing "the total amount for both the present offense and relevant conduct" under Sentencing Guidelines § 2D1.1. LK Report 8; DK Report 8.

The 750.95 gram amount was the sum of the 269 grams that were sold on February 14, plus the 481 grams (17 ounces) that Larry admitted to having "on the street." Petitioners objected to the inclusion of the 481 grams on the ground that there was no evidence that they possessed that amount of methamphetamine other than Larry's own "bare bone assertion," which they described as merely an excuse for not being able to produce sufficient funds to purchase Goodwin's methamphetamine on February 8, 1990. LK Report 20-21; DK Report 27-28.

Petitioners also objected to the reports' conclusion that they were not entitled to a two-point reduction under Sentencing Guidelines § 3E1.1 for acceptance of responsibility. LK Report 21-22; DK Report 28. Larry further objected to the conclusion in his presentence report that his offense level should be increased by two levels under Guidelines § 3B1.1 for his "managerial role" in the conspiracy. LK Report 22.

The probation officer declined to revise the presentence reports on any of these grounds. The officer noted that, "[i]n a drug distribution case such as this one, the guidelines allow for quantity and types of drugs not specified in the offense of conviction to be included in determining the offense level" if they were part of the same scheme or plan as the count of conviction. LK Report 21. The officer observed that Larry had readily admitted that he had 17 ounces of methamphetamine on the street, and that the 17 ounces were part of the scheme or plan that included the February 14 transaction. Moreover, there was

corroborating evidence for Larry's statement concerning the quantity of drugs he had for sale: Shook admitted to the authorities that she and Larry were trying to raise money by collecting for "previously purchased methamphetamine." She also stated that she and Larry had eight ounces of unsold methamphetamine. LK Report 21; DK Report 28.

The probation officer further found that neither Larry nor David was entitled to a reduction in his sentence for acceptance of responsibility. The officer explained that Larry had admitted only that he was involved in the February 14 sale and did not admit that he participated in any other acts of the conspiracy. Larry had attempted to minimize his role in the offense, and had failed satisfactorily to explain how he accumulated the money necessary for the drug purchase. LK Report 22. The officer found that David had also minimized his role in the conspiracy, claiming that his involvement was limited to the February 14 transaction. David further stated that he was unaware that his brother planned to purchase methamphetamine from Officer Goodwin on February 14. The probation officer explained, however, that investigative reports reflected that David was actually the money carrier for his brother, and that he must have known that his brother intended to make the February 14 sale. DK Report 28-29.

Finally, the probation officer rejected Larry's claim that he did not act in a managerial role, finding that both the investigative reports and petitioners' actions during the February 14 transaction established that Larry was the "central

figure controlling the drug negotiations and the decision maker as to when the transaction would occur." The probation officer also found that Larry "controlled the actions of the co-defendants throughout the drug conspiracy." LK Report 22.

At the sentencing hearing, the district court found that there was sufficient, reliable information that petitioners were responsible for the additional 17 ounces of methamphetamine, that Larry had a leadership role in the conspiracy, and that neither Larry nor David was entitled to a reduction for acceptance of responsibility. 10/3/90 Tr. 14-15, 17.

3. The court of appeals affirmed in part and remanded in part for further proceedings. The court held that it was not clearly erroneous for the district court to base its calculation of the petitioners' offense levels on the 750.95 gram amount of methamphetamine, which included the amount actually sold to Officer Goodwin and the 17 ounces of drugs Larry claimed to have "on the street." Pet. App. 553. The court rejected petitioners' claim that consideration of the 17 ounces violated petitioners' plea agreement. The court found that the government promised that it would not prosecute petitioners for any other offenses, and that to include the 17 ounces for sentencing purposes did not violate that promise. Id. at 554. In addition, the court found that petitioners were not entitled to a sentence reduction for acceptance of responsibility because they minimized their culpability for the offense charged and "denied their culpability for any criminal conduct beyond the specific offense charged."

Ibid. The court also found the evidence sufficient to support the district court's enhancement of Larry's offense level based on his leadership role in the conspiracy. Id. at 556-557.

Finally, the court rejected petitioners' contention that methamphetamine was improperly classified as a Schedule II controlled substance. The court found that although methamphetamine was originally classified as a Schedule III controlled substance, the Director of the Bureau of Narcotics and Dangerous Drugs had reclassified methamphetamine in 1971 as a Schedule II substance pursuant to a valid delegation of the Attorney General's reclassification authority under 21 U.S.C. 811(a). Pet. App. 556.[2/]

ARGUMENT

1. Petitioners claim (LK Pet. 6-12; DK Pet. 6-17) that the district court improperly calculated their base offense levels by

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[2/] The district court remanded the case to the district court for resentencing of both petitioners, because at the time of the offense, Title 21 provided two different penalties for overlapping offenses: Section 841(b)(1)(A)(viii) provided for a sentence of ten years to life imprisonment if the offense involved at least 100 grams of methamphetamine, or at least 100 grams of a mixture or substance containing methamphetamine, and Section 841(b)(1)(B)(viii) provided for a sentence of 5-40 years' imprisonment if the offense involved at least 10 grams of methamphetamine, or at least 100 grams of a mixture or substance containing methamphetamine. Because the district court sentenced petitioners under subsection (A)(viii), which carried the more severe penalty, the court of appeals remanded to allow the government to show that the 269 grams of methamphetamine seized on February 14 contained at least 100 grams of pure methamphetamine, in which case petitioners could be sentenced under subsection (A)(viii). Pet. App. 555-556. On remand, the government established that the 269 grams of methamphetamine contained approximately 200 grams of pure methamphetamine. Accordingly, the district court let stand petitioners' original sentences under subsection (A)(viii).

considering the 17 ounces of methamphetamine that Larry stated he had "on the street." Petitioners' argument appears to be both that it was error to consider quantities of methamphetamine other than the 269 grams involved in the February 14 transaction, and that there was insufficient evidence of their involvement with the additional 17 ounces of methamphetamine. The court of appeals correctly rejected these claims.

It was not error to consider quantities of methamphetamine in excess of the 269 grams involved in the February 14 sale. Under Guidelines § 2D1.1, the offense level for controlled substance offenses is based on the amount of drugs involved in the offense. The conduct underlying the offense of conviction in this case was not limited to the February 14 transaction. The count of the indictment to which petitioners pleaded guilty charged them with engaging in a conspiracy during the period from February 7 to February 14, 1990, to possess with intent to distribute more than 100 grams of methamphetamine. That count encompassed possession of any amounts of methamphetamine in excess of 100 grams with the intent to distribute it during the pertinent period. Evidence was presented in the presentence reports and at sentencing that petitioners had at least 17 ounces for sale during the period from February 8 to 14. Thus, petitioners were properly sentenced based on their possession of that amount. See Sentencing Guideline § 1B1.3(a)(1) (offense level should be based on all acts committed "in furtherance of [the] offense").

Even if possession of the 17 ounces is not considered part of the offense of conviction, the sentence was still properly calculated. The courts of appeals have agreed that the sentencing court is not limited to the drugs involved in the offense of conviction when calculating the offense level for a controlled substance offense. Under Guidelines § 1B1.3(a)(2), the court may calculate the sentence based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." See, e.g., United States v. Williams, 917 F.2d 112, 114 (3d Cir.), cert. denied, 111 S. Ct. 1001 (1991); United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), modified on other grounds, 946 F.2d 654 (1991); United States v. Rutter, 897 F.2d 1558, 1561-1562 (10th Cir.), cert. denied, 111 S. Ct. 88 (1990); United States v. White, 888 F.2d 490, 496-498 (7th Cir. 1989); United States v. Blanco, 888 F.2d 907, 909-911 (1st Cir. 1989); United States v. Ykema, 887 F.2d 697, 699 (6th Cir. 1989), cert. denied, 493 U.S. 1062 (1990); United States v. Scroggins, 880 F.2d 1204, 1211-1212 (11th Cir. 1989), cert. denied, 494 U.S. 1083 (1990); United States v. Williams, 880 F.2d 804, 805-806 (4th Cir. 1989); United States v. Mann, 877 F.2d 688, 690 (8th Cir. 1989); United States v. Taplette, 872 F.2d 101, 105-106 (5th Cir.), cert. denied, 493 U.S. 841 (1989); United States v. Guerrero, 863 F.2d 245, 248-250 (2d Cir. 1988).[3/]

[3/] Relying on United States v. Galloway, 943 F.2d 897 (8th Cir. 1991), and United States v. Miller, 910 F.2d 1321 (6th Cir.
(continued...)

In this case, there was sufficient evidence to support the district court's finding that petitioners were engaged in illicit activity involving amounts of metamphetamine apart from the quantity sold to Officer Goodwin. In explaining why he did not have ready cash to buy the full pound of methamphetamine that Officer Goodwin offered for sale, Larry told Goodwin that he had 17 ounces of methamphetamine "on the street." There was additional evidence that Larry's statement concerning this amount was not mere "puffery," as petitioners claim (see LK Pet. 10, DK Pet. 10): An informant had advised the authorities that Larry and Shook were well-known dealers of methamphetamine, selling from one-half to one pound of methamphetamine per week, and that Larry was looking for a new source of supply. Gov't C.A. Br. 9. Moreover, Shook advised Goodwin that Larry's organization was

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[3]/(...continued)
1990), cert. denied, 111 S. Ct. 980 (1991), petitioner David Kinder claims (DK Pet. 16) that "the Sentencing Commission has exceeded its authority under its enabling legislation and the United States Constitution by drafting Section 2D1.1 and 2D1.4 to encompass unconvicted criminal conduct." His reliance on those cases is misplaced. In Miller, the court rejected the defendant's claim that the court could not base its sentence on quantities of drugs not specified in the count of conviction. Presumably, petitioner is relying on Judge Merritt's dissent in that case. In Galloway, the court held that the Sentencing Commission lacked statutory authority to promulgate Sentencing Guidelines § 1B1.3, which requires district courts to consider "related conduct" not encompassed by the offense of conviction in determining the defendant's offense level. On November 20, 1991, however, the court vacated its judgment and granted rehearing en banc. The only other courts of appeals to consider the issue have concluded that the Sentencing Commission did not exceed its statutory authority in promulgating Guidelines § 1B1.3. See United States v. Thomas, 932 F.2d 1085, 1087-1089 (5th Cir. 1991), cert. denied, 112 S. Ct. 887 (1992); United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990).

trying to raise money for the February 14 purchase by collecting on previous sales, and she added that she and Larry had eight ounces of unsold methamphetamine. From that evidence the district court could properly find that petitioners were responsible for quantities of methamphetamine above the amount involved in the February 14 transaction, and that the involvement extended to the 17 ounces mentioned by Larry.[4]/

Petitioner David Kinder argues (DK Pet. 12-16) that the 17 ounces of methamphetamine should be attributed to his brother, but not to him, since the government failed to prove that he was linked to the additional quantity of drugs. As the court of appeals found (Pet. App. 554), the evidence showed that David worked closely with Larry: he brought the money for the February 14 transaction, he tested the drugs with his own syringe, and he took possession of the drugs. Moreover, he was present when Larry advised Officer Goodwin that he had 17 ounces of metham-

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[4]/ Petitioners urge (Pets. 9) this Court to adopt a "clear and convincing evidence" standard of proof for factual findings at sentencing. The courts of appeals, however, have ruled that the preponderance of the evidence standard ordinarily applies to findings of fact under the Guidelines. United States v. Wilson, 900 F.2d 1350, 1353-1354 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 111 S. Ct. 171 (1990); United States v. Alston, 895 F.2d 1362, 1372-1373 (11th Cir. 1990); United States v. Howard, 894 F.2d 1085, 1089-1090 (9th Cir. 1990); United States v. Carroll, 893 F.2d 1502, 1506 (6th Cir. 1990); United States v. Blanco, 888 F.2d 907, 909 (1st Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-291 (3d Cir. 1989); United States v. Guerra, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989), cert. denied, 493 U.S. 1062 (1990); United States v. Urrego-Linares, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989).

phetamine on the street. When asked by Larry if the methamphetamine was "good enough," David nodded enthusiastically, thus suggesting extensive previous experience with methamphetamine. From these circumstances, the district court could properly infer that David's involvement in his brother's methamphetamine operation extended beyond the February 14 transaction, and that he was therefore responsible for amounts of methamphetamine in excess of the 269 grams sold in the February 14 transaction.

2. Petitioners claim (LK Pet. 15-17; DK Pet. 18-20) that, in recommending that the court take into account amounts of methamphetamine other than the amount involved in the February 14 transaction, the government violated its agreement not to prosecute them for offenses other than the one to which they pleaded guilty. As already explained, the conduct underlying the offense of conspiracy to which petitioners pleaded guilty included petitioners' possession of amounts of drugs in excess of the quantity sold to Officer Goodwin. Thus, consideration of that amount at sentencing did not violate petitioners' plea agreement. In any event, the plea agreement imposed no obligation on the government to disregard related criminal conduct in recommending a sentence for the offense of conviction. As the court of appeals correctly stated, consideration of amounts of drugs in excess of the amount involved in the offense of conviction for sentencing purposes is not equivalent to prosecution for offenses involving the greater amounts. See United States v. Jimenez, 928 F.2d 356, 363-364 (10th Cir.), cert. denied, 112 S. Ct. 164 (1991); United States v. Rodriguez, 925 F.2d 107, 112 (5th Cir. 1991); United States v. Smallwood, 920 F.2d 1231, 1239-1240 (5th Cir.), cert. denied, 111 S. Ct. 2870 (1991); United States v. Salazar, 909 F.2d 1447, 1448-1449 (10th Cir. 1990).

In the alternative, petitioners argue (LK Pet. 17; DK Pet. 20) that their guilty pleas were not knowing and voluntary because they were entered under a misapprehension as to the amount of drugs that would be considered in setting their sentence. That claim is unavailing. Prior to accepting their guilty pleas, the district court advised petitioners of the nature of the charge to which they were pleading guilty and the maximum punishment they faced. Petitioners were advised that they could be sentenced to life imprisonment, that the offense to which they were pleading guilty carried a mandatory minimum punishment of ten years' imprisonment, and that the Guidelines would determine the applicable sentencing range. 6/25/90 Tr. 6-7, 18-21. Petitioners assured the court that their pleas had been induced by no promises other than that contained in their plea agreements, and that no one had made any promise or prediction as to what their sentences would be. Id. at 21-23. In these circumstances, the court of appeals properly found that petitioners' guilty pleas were voluntary.

3. Petitioners argue (LK Pet. 18-19; DK Pet. 21-22) that they were entitled to a two-point reduction in their offense levels under Guidelines § 3E1.1 for acceptance of responsibility. Their argument appears to be that the entry of a plea of guilty

"effectively creates a presumption" that such a reduction will be given.[1/] Petitioners are mistaken. Guidelines § 3E1.1(c) expressly states that "[a] defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right." Accord § 3E1.1, Application Note 3 ("Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."). In addition, Application Note 5 to Guidelines §§ 3E1.1 explains that, because the sentencing judge occupies "a unique position to evaluate a defendant's acceptance of responsibility," the judge's determination whether the defendant is entitled to the reduction is "entitled to great deference on review." See United States v. Harris, 882 F.2d 902, 905 (4th Cir. 1989) (whether a defendant has accepted responsibility is a factual question subject to review under the clearly erroneous standard); United States v. Wilson, 878 F.2d 921, 923 (6th Cir. 1989) (same); United States v. Franco-Torres, 869 F.2d 797, 799 (5th Cir. 1989) (same).

[1/] Petitioners also claim (LK Pet. 19; DK Pet. 22) that the government rejected their offer for a "debrief[ing]," and that the government should not be allowed to defeat the acceptance of responsibility reduction by rejecting their offer of assistance. The record establishes, however, that the government declined the offer of assistance because it believed petitioners were being untruthful. 10/3/90 Tr. 15.

Although Larry admitted being involved in the single drug transaction of February 14, he did not admit being part of any other acts of the conspiracy, and he attempted to minimize his overall role in the offense. For example, he failed to explain how he had accumulated the money necessary for the February 14 drug purchase. David also minimized his role in the conspiracy, stating that he was unaware that his brother planned to purchase methamphetamine from Officer Goodwin on February 14. The district court was therefore correct in concluding that petitioners did not merit the two-level reduction for acceptance of responsibility. Petitioners also complain (LK Pet. 21-22; DK Pet. 18-19) that requiring them to admit to incriminating conduct in order to obtain an acceptance of responsibility reduction under Guidelines § 3E1.1 violated their Fifth Amendment privilege against compelled self-incrimination. To the extent that petitioners claim that requiring them to accept responsibility for the offense of conviction violated their Fifth Amendment rights, their claim is without support. When a defendant pleads guilty to a crime, he waives his privilege as to the acts underlying the offense. Namet v. United States, 373 U.S. 179, 188-189 (1963); United States v. Frierson, 945 F.2d 650, 656 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992); United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982).

If petitioners' claim is that it violates the Fifth Amendment to deny them a reduction in sentence unless they admit

responsibility for conduct that is not part of the offense of conviction, this case would still not merit the Court's review. The district court refused to reduce the sentence because petitioners were unwilling to admit to any activities apart from the February 14 transaction. As already explained, the conduct of conviction is not confined to that transaction. Thus, the court's refusal to reduce sentence for failure to admit conduct other than the sale of drugs to Goodwin does not necessarily penalize petitioners for failing to admit their involvement in other offenses, since the conduct that they declined to admit included conduct that was encompassed by the charged conspiracy to which they pleaded guilty.

Even if the offense of conviction encompassed only the February 14 transaction, this case would still not present an occasion to decide whether it would violate the Fifth Amendment to interpret Guidelines § 3E1.1 to require a defendant to admit to unconvicted conduct to obtain a reduced sentence. See, e.g., United States v. Oliveras, 905 F.2d 623, 626-628 (2d Cir. 1990) (finding Fifth Amendment violation); United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989). Petitioners were denied an adjustment based, inter alia, on the district court's conclusion that petitioners had not been truthful in denying their culpability for any criminal conduct extending beyond that transaction. Accordingly, this case is not a good vehicle for addressing the Fifth Amendment implications of Guideline § 3E1.1. See Bryson v. United States, 396 U.S. 64, 72 (1969) ("It cannot

be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the government's right to ask questions --lying is not one of them."). As one court of appeals explained in similar circumstances:

> The district judge made a credibility determination that was not clearly erroneous. We therefore need not reach the fifth amendment issue. Should some future [defendant] demonstrate sincerity and remorse while at the same time he declines to expound upon other criminal conduct because of a concern with self-incrimination, then perhaps the issue will be squarely presented.

United States v. Taylor, 937 F.2d 676, 681 (D.C. Cir. 1991); accord United States v. Frierson, 945 F.2d at 660-662.

4. There is also no merit in petitioner Larry Kinder's challenge (LK Pet. 13-14) to the two-level increase under Guidelines § 3B1.1(c) for his role as an "organizer, leader, manager, or supervisor in any criminal activity * * *." See United States v. Herrera, 878 F.2d 997, 1000-1002 (7th Cir. 1989) (two-level increase upheld where husband supervised wife in possessing with intent to distribute cocaine). The finding that a defendant is a manager or supervisor of criminal activity is essentially factual, see United States v. Fuentes-Moreno, 895 F.2d 24, 26 (1st Cir. 1990); United States v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir.), cert. denied, 492 U.S. 924 (1989), and should be upheld if it is not clearly erroneous, United States v. White, 875 F.2d 427, 432 (4th Cir. 1989).

The evidence clearly supported the district court's conclusion that Larry occupied a leadership role. Investigator Moore testified at the sentencing hearing that informants had advised law enforcement authorities that Larry was in charge of an extensive methamphetamine operation. Shook informed Officer Goodwin that she took care of Larry's dope business for him. Finally, during the February 14 transaction, it was Larry who negotiated with Goodwin and issued orders to his brother.

Petitioner asserts, however, that his dominance, if any, was the natural consequence of his romantic relationship with Shook and his position as David's older brother. Whatever the psychological or interpersonal underpinnings of Larry's leadership role, however, they do not alter or excuse that role. 5.

Finally, petitioners contend (LK Pet. 20-22; DK Pet. 23-25) that methamphetamine has never been lawfully reclassified as a Schedule II controlled substance. That claim is without merit.

The Controlled Substances Act of 1970, 21 U.S.C. 801 et seq., established five schedules of controlled substances and assigned an initial schedule to each controlled substance. 21 U.S.C. 812(a). Section 201(a) of the Act authorized the Attorney General to add or remove substances from the schedules, or to move substances from one schedule to another, in accordance with certain specified statutory procedures. 21 U.S.C. 811(a). See generally Touby v. United States, 111 S. Ct. 1752, 1754 (1991). Under the authority of 21 U.S.C. 871(a) and 28 U.S.C. 510, the Attorney General in 1971 delegated the reclassification authority

to the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD). 28 C.F.R. 0.100 (1971).

Following the procedures outlined in the Act, the Director of BNDD transferred all methamphetamine from Schedule III to Schedule II. On May 26, 1971, the Director published a notice in the Federal Register of the proposed transfer. 36 Fed. Reg. 9563 (1971). The Director stated that the proposed transfer was based upon the agency's investigation and "upon the scientific and medical evaluation and recommendation of the Secretary of Health, Education and Welfare * * *."

On July 7, 1971, the Director's order transferring all forms of methamphetamine from Schedule III to Schedule II was published in the Federal Register. 36 Fed. Reg. 12,734 (1971). The order set forth the factual findings required by 21 U.S.C. 812(b)(2) to reschedule methamphetamine: that methamphetamine had a high potential for abuse, that it had a limited acceptable medical use, and that abuse of the drug could lead to severe psychological or physical dependence. Thus, in reclassifying methamphetamine as a schedule II drug in 1971, BNDD complied with all the statutory requirements.[1/] Each court of appeals that has

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[1/] Petitioners' reliance (LK Pet. 21-22; DK Pet. 24-25) on United States v. Widdowson, 916 F.2d 587 (10th Cir. 1990), is misplaced. There, the court held, inter alia, that the Attorney General lacked statutory authority to subdelegate to the Administrator of the DEA his Section 201(h) powers temporarily to schedule a drug. This Court vacated and remanded that case for further consideration in light of its decision in Touby v. United States, 111 S. Ct. 1752 (1991), that the Attorney General did not improperly delegate his temporary scheduling power to the DEA. 112 S. Ct. 39 (1991).

considered the issue has agreed with the conclusion that methamphetamine was properly reclassified from Schedule III to Schedule II. See United States v. Lane, 931 F.2d 40, 41 (11th Cir. 1991); United States v. Roark, 924 F.2d 1426, 1429 (8th Cir. 1991); United States v. Kendall, 887 F.2d 240, 241 (9th Cir. 1989); see also United States v. Roya, 574 F.2d 386, 392-393 (7th Cir.), cert. denied, 439 U.S. 857 (1978).[1/]

[1/] A few courts have incorrectly stated that the DEA reclassified methamphetamine as a Schedule II drug in 1974. See United States v. Schrock, 855 F.2d 327, 332 (6th Cir. 1988); United States v. Jones, 852 F.2d 1235, 1236-1237 (9th Cir. 1988); United States v. Burnes, 816 F.2d 1354, 1358 (9th Cir. 1987). The only authority cited for the proposition that the reclassification occurred in 1974 is 39 Fed. Reg. 22,142. However, that citation to the Federal Register shows only that on June 20, 1974, the DEA, as required by statute (21 U.S.C. 812(a)), updated and republished its list of scheduled substances.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992